IP 04-1496-C T/K Automotive Finance v Kaputa
Judge John D. Tinder Signed on 08/24/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AUTOMOTIVE FINANCE CORPORATION,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-01496-JDT-TAB
	)	
GARRY PAUL KAPUTA,	)	
FRANK KAPUTA USED CARS,	)	
PAYNE PHILLIPS AUTO MALL, INC.,	)	
THE AUTO MALL,	)	
PETER J. PAYNE JR.,	)	
LISA M. PAYNE,	)	
PAUL KAPUTA,	)	
ANTHONY J. CONNOR,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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AUTOMOTIVE FINANCE CORPORATION, Plaintiff, vs. GARRY PAUL KAPUTA d/b/a FRANK KAPUTA USED CARS f/n/a PAYNE PHILLIPS AUTO MALL, INC. d/b/a THE AUTO MALL; PETER J. PAYNE, JR.; LISA M. PAYNE; ANTHONY J. CONNOR; and PAUL KAPUTA d/b/a FRANK KAPUTA USED CARS, Defendants.	)	1:04-cv-1496-JDT-TAB

ENTRY ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Docket No. 27)[1]

Plaintiff Automotive Finance Corporation ("AFC") brings this diversity action against Defendants Garry Paul Kaputa d/b/a Frank Kaputa Used Cars f/n/a Payne Phillips Auto Mall, Inc. d/b/a the Auto Mall; Peter J. Payne, Jr.; Lisa M. Payne; Anthony J. Connor; and Paul Kaputa d/b/a Frank Kaputa Used Cars, alleging *inter alia* breach of a note and security agreement and breach of a guaranty. Now before the court is AFC's Motion for Summary Judgment (Docket No. 27) against Defendants Peter J. Payne and Lisa M. Payne (the "Paynes"). After carefully reviewing the parties' briefs and supporting materials, the court finds as follows:

[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

I. BACKGROUND

Peter Payne was the president of the corporation known as Payne Phillips Auto Mall, Inc. ("Auto Mall"). Garry Kaputa was the sales manager for Auto Mall. (Kaputa Aff. ¶ 2.) Auto Mall ceased doing business on June 30, 2002. (Resp., Peter Payne Aff. ¶ 5; Kaputa Aff. ¶ 4.) Kaputa Used Cars began doing business on August 1, 2002, as a sole proprietorship owned by Garry Kaputa ("Kaputa"). (Kaputa Aff. ¶ 5.) The Paynes maintain that neither Auto Mall nor the Paynes had an interest in or was affiliated in any way with Kaputa Used Cars. (Resp. Peter Payne Aff. ¶ 7; Resp., Lisa Payne Aff. ¶ 3; Kaputa Aff. ¶¶ 6-7.)

On April 30, 2002, Peter Payne, acting on behalf of Auto Mall, executed a Promissory Note and Security Agreement (the "Note") in favor of AFC. (Compl. Ex. 1.) Shortly thereafter, on May 2, 2002, the Paynes, Garry Kaputa, and Anthony Connor executed an Unconditional and Continuing Guaranty with respect to the Note (the "Guaranty"). (Compl. Ex. 4.) Neither side disputes the validity of the Note and Guaranty.

However, the parties have very different views of the next two relevant documents: an Amendment to the Note (the "Amendment") and an Aggregate Advance Limit Amendment to the Note (the "AALA"). The Amendment reflected the Auto Mall's change in name, address, and business structure from a corporate entity to a sole proprietorship called Frank Kaputa Used Cars ("Kaputa Used Cars"). (Reply, Ex. B.) This Amendment was "signed" by Garry Kaputa and the Paynes on October 4, 2002.

The AALA operated to adjust the aggregate advance limit under the Note to $150,000, and was "signed" by Garry Kaputa and the Paynes on August 4, 2003. (Compl., Ex. 2.) The court writes "signed" in quotation marks because the Paynes maintain that their signatures on both the Amendment and the AALA are forgeries. (Resp., Peter Payne Aff. ¶ 8; Resp., Lisa Payne Aff. ¶ 4; Surreply, Peter Payne Aff. ¶ 6; Surreply, Lisa Payne Aff. ¶ 2.) In fact, both Garry Kaputa and Sheila Weaver, the notary public indicated on the AALA, both testify that the Paynes did not execute the AALA. (Kaputa Aff. ¶ 8; Resp., Weaver Aff. ¶ 3.)

AFC brought this action against the Paynes to enforce the Guaranty after Kaputa Used Cars failed to tender payment under the Note. Specifically, AFC alleges that the Paynes are liable as guarantors for $118,672.29 on the Note's account balance as well as $7,392.92 in attorney's fees and costs.

II. DISCUSSION

A. Standard of Review

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, affidavits, and other materials demonstrate that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light most reasonably favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999). However, once a properly supported motion for summary judgment is made, the non-movant "cannot rest on the pleadings alone, but must identify specific facts to establish that there is a genuine triable issue." *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994); *see* Fed. R. Civ. P. 56(e).

B. The Unconditional and Continuing Guaranty

Before turning to the Paynes' allegations of forgery the court must first address the terms and conditions of the Guaranty. In doing so, the court applies ordinary rules of contract interpretation and "must give effect to the intentions of the parties, which are to be ascertained from the language of the contract in light of the surrounding circumstances." *Kruse v. Nat'l Bank of Indianapolis*, 815 N.E.2d 137, 144 (Ind. Ct. App. 2004) (citation omitted); *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 585 (Ind. Ct. App. 2001). A guaranty is defined as "a promise to answer for the debt, default, or miscarriage of another person." 38 Am. Jur. 2d *Guaranty* § 1 (1999). The extent of a guarantor's liability is determined by the terms of his or her contract. *Kruse*, 815 N.E.2d at 144; *S-Mart*, 744 N.E.2d at 585. The terms of a guaranty should neither be so narrowly interpreted as to frustrate the obvious intent of the parties, nor so loosely interpreted as to relieve the guarantor of a liability fairly within its terms. *Kruse*, 815 N.E.2d at 144; *S-Mart*, 744 N.E.2d at 585.

Both parties agree that the Paynes became unconditional and continuing guarantors for the debtor-dealership, Auto Mall, on May 2, 2002, by signing the Guaranty. However, there are very few facts that are not in dispute concerning the events that followed the signing of the Guaranty. On October 4, 2002, Garry Kaputa, as owner of Kaputa Used Cars, executed the Amendment, changing the name, address, and business structure of the debtor of the Note from the corporate Auto Mall, to the sole proprietorship Kaputa Used Cars. The parties dispute whether the Paynes also signed the Amendment as guarantors under the original Note. On August 4, 2003, Kaputa executed the ALAA. The parties dispute whether the Paynes also signed the ALAA as guarantors. Apparently, sometime after the execution of the ALAA, AFC loaned funds to Kaputa Used Cars ("Kaputa Loan"). Kaputa Used Cars defaulted on the loan. AFC seeks recovery from the Paynes as guarantors under the original Note. The problem here is that the debt in question did not arise from a loan extended to Auto Mall, the original debtor. Instead, it was a loan extended to Garry Paul Kaputa d/b/a Frank Kaputa Used Cars. Thus, the real dispute is whether the Paynes are guarantors to the loan extended from AFC to Kaputa Used Cars. AFC has suggested three possible theories in which this court should construe the Paynes as guarantors to the Kaputa Loan. Each theory will be discussed in turn as to its merit in granting AFC summary judgment.

1. Theory One: Auto Mall executed the ALAA

First, AFC contends that "Auto Mall executed [the ALAA] to the Note." (Mot. Summ. J. Br. at 2.) As unconditional and continuing guarantors for Auto Mall under the terms of the Guaranty, the Paynes would be liable to AFC if Auto Mall had executed the ALAA. However, AFC offers no evidentiary proof that Auto Mall executed the ALAA. AFC directs the court to Exhibit Two of the Complaint, which is the executed ALAA. Unfortunately for AFC, the name of the debtor-dealership indicated on the ALAA is "Garry Paul Kaputa, DBA: Frank Kaputa Used Cars," not Auto Mall. (Compl., Ex. 2.) Other than Garry Kaputa being both a guarantor for Auto Mall under the Guaranty and the sole owner of Kaputa Used Cars, AFC fails to provide evidence linking the business entity Auto Mall to the business entity Kaputa Used Cars. Conversely, the Paynes provide the affidavits of Peter Payne, Lisa Payne, and Garry Kaputa, all confirming that Auto Mall and Kaputa Used Cars are distinct and separate entities. Auto Mall was a corporate entity in which Peter Payne was the president and Garry Kaputa was the sales manager. Auto Mall ceased doing business on June 30, 2002. (Resp., Peter Payne Aff. ¶ 5; Kaputa Aff. ¶ 4.) Kaputa Used Cars is a sole proprietorship owned by Garry Kaputa and began doing business on August 1, 2002. (Kaputa Aff. ¶ 5.) Neither Auto Mall nor the Paynes had an interest in or was affiliated in any way with Kaputa Used Cars. (Resp. Peter Payne Aff. ¶ 7; Resp. Lisa Payne Aff. ¶ 3; Kaputa Aff. ¶¶ 6-7.) Because the evidence submitted by the Paynes effectively disputes the claim that Auto Mall executed the ALAA, summary judgment cannot be granted in favor of AFC under its first theory.

2. Theory Two: The Paynes signed the ALAA as Guarantors

Second, AFC proposes that the Paynes executed the ALAA as guarantors. Assuming that the Paynes had executed the ALAA as guarantors, then they would likely be liable for the loans extended to Kaputa Used Cars under the ALAA. Thus, whether or not the Paynes executed the ALAA as guarantors is a material question of fact. As evidence, AFC offers the ALAA, which contains signatures purporting to be those of the Peter and Lisa Payne. (Compl., Ex. 2.) However, the Paynes dispute this fact, maintaining that the purported signatures are forgeries. The Paynes offer their personal affidavits stating that they did not sign the AALA. (Resp., Peter Payne Aff. ¶ 8; Resp., Lisa Payne Aff. ¶ 4.) In addition, both Garry Kaputa and Sheila Weaver, the notary public indicated on the AALA, both testify that the Paynes did not execute the AALA. (Kaputa Aff. ¶ 8; Suppl. Resp., Weaver Aff. ¶ 3.) Because of the forgery evidence proffered by the Paynes, whether the Paynes executed the ALAA is a disputed fact that the court cannot resolve in the summary judgment stage. Thus, AFC's summary judgment motion fails under its second theory.

3. Theory Three: The unconditional and continuing nature of the guaranty requires liability

Finally, regardless of the disputed validity of the ALAA, AFC argues that the unconditional and continuing nature of the guaranty requires the Paynes to be liable for the Kaputa Loan. Neither party disputes that the Guaranty signed by the Paynes on May 2, 2002 was an unconditional and continuing guaranty. In resolving this matter,

this court must first examine the implications of an unconditional and continuing guaranty.

An unconditional guaranty is "a guaranty whereby the guarantor agrees to answer for the debt of the debtor, notwithstanding the occurrence or nonoccurrence of any event either within or not within the contemplation of the parties at the time the guaranty is executed." *Kruse v. Nat'l Bank of Indianapolis*, 815 N.E.2d 137, 141 (Ind. Ct. App. 2004) (quoting Peter A. Alces, *The Law of Suretyship and Guaranty*, § 1:4 (2003)). Defined in other terms, an unconditional guaranty is "an unconditional undertaking on the part of the guarantor that the person primarily obligated will make payment or will perform, and such a guarantor is liable immediately upon default of the principal without notice . . . . An [unconditional] guaranty, unlike a conditional one, casts no duty upon the creditor or holder of the obligation to attempt collection from the principal debtor before looking to the guarantor." *Id.* (*quoting McEntire v. Ind. Nat'l Bank*, 471 N.E.2d 1216, 1225 (Ind. Ct. App. 1984)).

Under a continuing guarantee, the creditor may renew or extend the guaranty without the guarantor's knowledge. *Id.* (*citing* Alces, *supra*, § 1:6). A continuing guarantee "contemplates a future course of dealing encompassing a series of transactions . . . . [A] contract is continuing if it contemplates a future course of dealing during an indefinite period, or if it is intended to cover a series of transactions or succession of credits, or if its purpose is to give to the principal debtor a standing credit to be used by him from time to time. A continuing guaranty covers all transactions, including those arising in the future, which are within the contemplation of the

agreement." *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 585 (Ind. Ct. App. 2001) (*quoting* 38 Am. Jur. 2d *Guaranty* § 20 (1999)).

AFC argues that the Paynes are bound by the Note and Guaranty, as modified by the ALAA, because unconditional and continuing guarantors are "not relieved of liability if the note is renewed, modified, or extended." *Kruse*, 815 N.E.2d at 149. Indeed, the Guaranty expressly states AFC's right to modify the terms of the Guaranty:

> The undersigned each hereby grants to AFC full power to deal in any manner with the Liabilities, including, but without limiting the generality of the foregoing, the following powers: (a) to modify or otherwise change any terms of all or any part of the Liabilities or the rate of interest thereon . . . .

(Compl., Ex. 4, ¶ 2.) But the right to modify the underlying obligation and continue to hold the guarantor liable, even an unconditional and continuing guarantor, is not absolute. Under Indiana common law, "where a continuing guaranty provides that it applies to modifications of the underlying agreement, in the absence of consent by the guarantors to the modifications, the continuing guaranty will extend to modifications that were either: 1) non-material alterations of the underlying agreement; or 2) material alterations shown to be within the contemplation of the parties at the time the agreement was executed." *S-Mart*, 744 N.E.2d at 587 (involving an unconditional and continuing guaranty to a lease agreement).[2] Neither party disputes that the October 4,

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[2] AFC asserts that the *Kruse* decision should control the analysis. (Reply Br. at 2.) *Kruse*, like *S-Mart*, involves the enforcement of an unconditional and continuing guaranty similar to the one in this case. *Kruse*, 815 N.E.2d at 141-42. *Kruse* rules that a continuing guaranty may be renewed or extended without the guarantor's knowledge. (continued...)

2002 Amendment altered the Note. Under the Amendment, the debtor's name, business-structure, and address were changed from the corporate Auto Mall to the sole proprietorship Kaputa Used Cars. (Reply, Ex. B.) The question that remains for this court is whether this alteration released the Paynes from liability as guarantors under the Note.

Under the *S-Mart* analysis, the continuing guarantors are not released from liability if they consented to the alteration. *S-Mart*, 744 N.E.2d at 587. AFC maintains that the Paynes consented to the alteration by signing the October 4, 2002 Amendment. (Reply, Ex. B.) In addition, AFC provides a letter allegedly written and signed by Peter Payne on October 9, 2002, just five days after the Amendment, in which Peter Payne acknowledged that he was a guarantor for Kaputa Used Cars. (Reply, Ex. A.) In fact, AFC also provides the affidavit of Sheila Weaver, who claims she witnessed and notarized Peter Payne's signature on the October 9, 2002 letter and that she recognizes the signature on the October 2, 2002 Amendment as belonging to Peter Payne. (Reply, Weaver Aff. ¶¶ 8, 9.) Either the execution of the Amendment or a signed letter consenting to the Amendment would serve as effective consent to the alteration. However, the Paynes dispute ever signing or otherwise consenting to the Amendment.

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[2](...continued)
Id. at 149. However, unlike *S-Mart*, *Kruse* does not involve a material alteration to the underlying obligation. In fact, the *Kruse* court found that the guarantor failed "to designate evidence establishing a genuine issue of material fact as to whether there was a material alteration of [the] underlying obligation." *Id.* at 150. Here, as will be discussed, the Paynes effectively designate evidence establishing a genuine issue of material fact as to whether there was a material alteration of the underlying obligation. Thus, *S-Mart*, not *Kruse*, controls.

They maintain that the signatures are forgeries. (Surreply, Peter Payne Aff. ¶ 6; Surreply, Lisa Payne Aff. ¶ 2.) Peter Payne further contends that Weaver could not have witnessed or notarized his signature on the October 9, 2002 letter because Peter had not been in contact with Weaver since June 2002. (Surreply, Peter Payne Aff. ¶¶ 3-5.) Clearly, the Paynes designate evidence to dispute whether they consented to the Amendment.

Even if the Paynes did not consent to the Amendment, they can still be held liable as guarantors if the Amendment was 1) non-material; or 2) within the contemplation of the parties at the time the Note and Guaranty were signed. *S-Mart*, 744 N.E.2d at 587. The questions of materiality and what the parties contemplated at the time the guaranty was executed are questions of fact, analyzed on a case-by-case basis. *Id.* Both factual questions are material to the summary judgment motion. The issue that remains is whether these factual questions are disputed.

First, an alteration to the underlying agreement is material if it is "a change which alters the legal identity of the principal's contract, substantially increases the risk of loss to the guarantor, or places the guarantor in a different position." *Id.* at 586. The October 2, 2002 Amendment changed the name, business structure, and address of the debtor. The original debtor was Auto Mall, a corporate dealership in which Peter Payne was the president and Kaputa was the sales manager. The Paynes provide evidence that Auto Mall ceased doing business on June 30, 2002 and had paid off any remaining indebtedness to AFC at that time. (Resp., Peter Payne Aff. ¶¶ 5-6; Kaputa Aff. ¶ 4.) After the Amendment, the debtor was Kaputa Used Cars, a sole proprietorship owned

by Garry Kaputa. The affidavits of Peter Payne, Lisa Payne, and Kaputa all maintain that neither Auto Mall nor the Paynes had an interest in or was affiliated in any way with Kaputa Used Cars. The evidence provided by the Paynes suggests that Auto Mall and Kaputa Used Cars are separate and distinct business-entities. AFC fails to provide any factual evidence that this change in debtors was non-material under the Note and Guaranty. Thus, for purposes of the summary judgment motion, this court finds that the Paynes have provided evidence to dispute whether the Amendment was non-material.

Second, AFC fails to present evidence showing that the Paynes contemplated, at the time of the execution of the Guaranty, that they would continue as guarantors even if another business entity took the place of the original debtor, Auto Mall, without the Paynes's consent. It would seem most unusual that a guarantor would contemplate, at the time of execution of the guaranty, that it would continue to be held liable as a guarantor if the original debtor were to be replaced by another distinct and separate debtor without that guarantor's consent. Regardless, because AFC fails to present any evidence that at the time of execution the Paynes contemplated being held liable as guarantors to a different debtor, summary judgment cannot be granted in favor of AFC based on this point.

With respect to the three possible theories of liability set forth above, genuine issues of material fact govern whether the Paynes are liable to AFC as guarantors under the Guaranty and Note. Accordingly, AFC's Motion for Summary Judgment (Docket No. 27) must be **DENIED**.

III. CONCLUSION

For the foregoing reasons, Plaintiff AFC's Motion for Summary Judgment (Docket No. 27) is **DENIED**. A telephone conference will be scheduled to select a trial date.

ALL OF WHICH IS ENTERED this 24th day of December 2005.

John Daniel Tinder, Judge
United States District Court

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